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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (SMB) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	**TRUSTEE'S SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO BANCA CARIGE S.P.A.'S MOTION TO DISMISS BASED ON EXTRATERRITORIALITY AND IN FURTHER SUPPORT OF THE TRUSTEE'S MOTION FOR LEAVE TO AMEND THE COMPLAINT**
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. BANCA CARIGE S.P.A., Defendant.	Adv. Pro. No. 11-02570 (SMB)

The Trustee respectfully submits this memorandum as a supplement to his Main Brief being filed simultaneously herewith in opposition to the motion to dismiss based on extraterritoriality made by defendant Banca Carige S.P.A. ("Carige") and in further support of the Trustee's motion for leave to amend his Complaint.

BACKGROUND

Carige is a highly sophisticated, full-service bank and the parent company of Gruppo Banca Carige, a conglomerate including over a dozen major subsidiaries that provide a wide range of financial services. (Proffered Allegations at ¶ 3.) Carige was shareholder in Fairfield Sentry Limited ("Fairfield Sentry"), which invested substantially all of its assets with BLMIS. (Trustee's Complaint at ¶ 2; *id.* at Ex. C.). Carige received a subsequent transfer of $10,532,489 in BLMIS customer property from Fairfield Sentry (the "Transfer"). (*Id.*) The Trustee's Proffered Allegations demonstrate that the Trustee's action to recover this Transfer does not require an extraterritorial application of SIPA or Bankruptcy Code Section 550.

THE TRANSFER AND COMPONENT EVENTS OF CARIGE'S FAIRFIELD SENTRY TRANSACTIONS WERE PREDOMINANTLY DOMESTIC

Citing to *Maxwell I*, the District Court directed that "the location of the transfers as well as the component events of those transactions"[1] must be used to determine whether a subsequent transfer claim involves a domestic or extraterritorial application of the Code and SIPA.[2] Under the District Court's ruling, the Trustee need only put forth "specific facts suggesting a domestic

[1] Extraterritoriality Decision, 513 B.R. at 227 (citing *Maxwell I*, 186 B.R. at 816).

[2] In *Maxwell I*, the court examined all potential connections with the United States by reviewing: (i) the debtor's location; (ii) the defendants' location; (iii) where the defendants engaged in business regarding the transaction; (iv) what transaction and agreements the parties entered into that led to the antecedent debt that the transfers were used to pay; (v) where the parties' relationship was centered when conducting the transaction that triggered the transfers; (vi) the law governing the parties' transactions; and (vii) how the transaction was concluded. *In re Maxwell Commc'n Corp.*, 186 B.R. 807, 816-17 (S.D.N.Y. 1995).

transfer" to avoid dismissal.[3] This is a fact-based inquiry in which all reasonable inferences should be drawn in the Trustee's favor.[4]

Carige argues that simply because it and Fairfield Sentry were formally organized under the laws of foreign countries, the subsequent transfer it received is "purely foreign" and the Trustee's recovery action must be dismissed. This superficial argument disregards the *Maxwell I* analysis directed by the District Court and is inconsistent with Second Circuit extraterritoriality case law that similarly examines a transaction's various connections to the United States.[5]

Based on the facts set forth in the Proffered Allegations, there is no basis for dismissing this case on the grounds of extraterritoriality. The Transfer and component events of Carige's transactions with Fairfield Sentry were predominantly domestic.

To begin with, the entire purpose of Carige's investment with Fairfield Sentry was to invest in the U.S. securities markets through New York-based investment adviser BLMIS, and to earn returns on that U.S.-based investment. Specifically, Carige entered into a subscription agreement with Fairfield Sentry and affirmed that it knew (i) Fairfield Sentry invested almost exclusively with a New York-based, SEC-registered investment adviser (i.e. BLMIS) that invested in the U.S. securities market, and (ii) Carige's money would be transferred to that same investment adviser in New York. (Proffered Allegations at ¶¶ 7-8.) As Judge Lifland concluded in a similar matter, "[t]he movement of money to and from BLMIS in the United States . . . was

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[3] Extraterritoriality Decision, 513 B.R. at 232 n.4.

[4] *See, e.g., Anwar v. Fairfield Greenwich, Ltd.*, 728 F. Supp. 2d 372, 402-03 (S.D.N.Y. 2010) (deferring ruling on extraterritoriality at motion to dismiss phase and citing standard that "[t]he court must accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in the plaintiff's favor.").

[5] *See, e.g., Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 217 (2d Cir. 2014); *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 141 (2d Cir. 2014); and other cases cited in the Trustee's Main Brief.

not fortuitous or incidental; instead, it was 'the ultimate objective' and the '*raison d'etre*' of the Agreement between" the investor and the feeder fund.[6]

The express provisions of its agreement with Fairfield Sentry further demonstrate the domestic nature of Carige's investment transactions with Fairfield Sentry. Carige agreed in its subscription agreement with Fairfield Sentry that New York law would govern its investment in Fairfield Sentry, and it consented to U.S. jurisdiction. (Proffered Allegations at ¶ 10.) Thus, Carige had every expectation that U.S. laws would apply to its investment transactions and that it would be subject to suit in the United States.

Carige also purposefully used its own U.S. bank account and the U.S. banking system in connection with its subscription into and Transfer from Fairfield Sentry. Specifically, in both its subscription agreement and redemption documents, Carige designated a bank account in its own name at Wachovia Bank in New York for remitting its subscription to, and receiving its Transfer from, Fairfield Sentry. (*Id.* at ¶¶ 12-13.) Carige also remitted its subscription into a U.S. correspondent account at the direction of Fairfield Sentry, which funds were then ultimately delivered to BLMIS in New York. (*Id*. at ¶ 14.)

Beyond all of the above domestic components, Carige's argument that its transactions are "purely foreign" is wrong because it ignores the reality of Fairfield Sentry, from which it received the Transfer. Fairfield Greenwich Group ("FGG") in New York created, managed, and controlled Fairfield Sentry. (*Id.* at ¶ 15.) Fairfield Sentry was based out of New York and had its principal place of business in New York. (*Id.*) Although technically registered in the BVI, Fairfield Sentry had no employees or offices there, and at all times, operational decisions were

[6] *Picard v. Bureau of Labor Ins. (In re BLMIS)*, 480 B.R. 501, 513 (Bankr. S.D.N.Y. 2012).

made by FGG employees in New York.[7] (Proffered Allegations at ¶¶ 20, 26-27.) In its BLMIS account opening documents, FGG listed Fairfield Sentry's address as in the United States. (*Id.* at ¶ 23.) Fairfield Sentry's initial and on-going due diligence on BLMIS was conducted in New York, and the operative legal documents for its BLMIS accounts were governed by New York law. (*Id.* at ¶¶ 24, 26.) BLMIS in New York served as Fairfield Sentry's investment manager and implemented the split-strike conversion strategy for Fairfield Sentry. (*Id.* at ¶¶ 8, 37.)

CONCLUSION

For the forgoing reasons and those stated in the Trustee's Main Brief, Carige's motion to dismiss should be denied, and the Trustee's motion for leave to amend his Complaint should be granted.

Dated: June 26, 2015
New York, New York

By: /s/ Thomas L. Long

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[7] *See SEC v. Gruss*, 2012 WL 3306166 at *3 (S.D.N.Y. Aug 13, 2012) (finding that issues of fact existed regarding whether an offshore fund was "foreign" for purposes of extraterritoriality where complaint alleged that operational and investment decisions for the offshore fund were made in New York, "such that for all intents and purposes, the [offshore fund] was based in New York").